United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-6065

No. 76-6065

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CITY OF ROCHESTER and GENESEE-FINGER LAKES REGIONAL PLANNING BOARD,

Plaintiffs-Appellants,

v.

UNITED STATES POSTAL SERVICE and BENJAMIN F. BAILAR, UNITED STATES POSTMASTER GENERAL,

Defendants-Appellees.

B
P/S

BRIEF AMICUS CURIAE

THE COLUMBIA UNIVERSITY
ENVIRONMENTAL LAW COUNCIL
Amicus Curiae
Law School Building
435 West 116th Street
New York, New York 10027
Tel.: (212) 280-2379

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Interest of Amicus

The Columbia University Environmental Law Council, organized in 1969 at the Columbia University School of Law in New York City, is a voluntary, non-profit organization of students attending the Columbia University School of Law as well as other educational units of Columbia University. In the spring of 1974, the Council commenced an active role in environmental legal affairs through appearance as a party-in-interest at public hearings held by the New York State Department of Environmental Conservation. In July, 1975, the Council submitted a brief amicus curiae to the New York Supreme Court, Special Term, Part 1, Queens County, in the case of New York City Housing Authority v. Commissioner of the Environmental Conservation Department. That case, arising out of an administrative decision based on a public hearing at which the Council had appeared, raised the issue of the Constitutionality of New York's Tidal Wetlands Act in light of petitioner's claim of a "taking" without just compensation through the imposition of a wetlands development moratorium on his property. The Council argued against the taking issue and went on to note the validity of the Act under the common law "public trust" doctrine. Cases cited by the Council for the latter proposition were cited by Special Term in its decision upholding the administrative decision under the Act. See 372 N.Y.S. 2d 146 (1975).

It is the purpose of the Council to (1) furnish data or legal research to the tribunal before which it appears so as to assist that tribunal in rendering a decision on the merits of environmental issues raised; (2) take a position on what it, by concurrence of its membership, feels is an issue significantly affecting the public interest. In the instant case, the Council perceives a broad issue concerning the impact of Federal agency relocations from the central city to the suburbs, a process which the Council believes accelerates the process of urban environmental decay. The instant case therefore has grave implications

for other central cities-including the Council's native New York City. Further, the Council believes that under the National Environmental Policy Act of 1969, there is a strong public interest in the proper generation and consideration of environmental impact data by an action-initiating federal agency; this interest persists regardless of administrative cost, delay or progress already realized in the completion of a part of the project in question.

ARGUMENT

I. DEFENDANTS HAVE VIOLATED NEPA AND THEIR OWN ADMINISTRATIVE REGULATIONS BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT, AND SHOULD BE REQUIRED TO PREPARE SUCH A STATEMENT.

A. Judicial Review of Agency Threshold Determination Not to Prepare an EIS is Appropriate Here and Favors Plaintiffs' Cause of Action.

1. Judicial Review

a. The "Arbitrary and Capricious" Standard.

The appropriate standard for judicial review of an agency's threshold determination not to prepare an EIS is whether the decision was "arbitrary or capricious" under section 10(e) of the Administrative Procedure Act, 5 U.S.C. §706. Hanly v. Kleindienst (Hanly II), 471 F.2d 823, 829 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1972). If the agency action is determined to be arbitrary and capricious, the agency has violated NEPA since §102(2)(C) of NEPA requires a formal, detailed EIS for all major federal actions significantly affecting the quality of the human environment, and it is for the agency to properly show that a particular act in question was not subject to the EIS requirement. This court may review the agency's finding that the action in question was "not significant" because the interpretation of the term is a question of law. Hanly II, supra, at 828. The court may determine whether or not the Environmental Assessment issued in lieu of an EIS by the agency sufficiently complied with NEPA and if not, may remand it to the agency for consideration of omitted relevant and required factors. Trinity Episcopal School Corporation v. Romney, 523 F.2d 88 (2d Cir. 1975). The general rule on the sufficiency of the Assessment is that the agency must provide convincing reasons why a project with arguably potentially significant environmental impact does not require a detailed EIS. Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973). The court may also pass upon the agency's interpretation of

the word "controversial" in the context of the agency's policy of preparing an EIS where a proposed action will, or may be, environmentally "controversial." The standard applied in the Second Circuit is whether a substantial dispute exists as to the size, nature, or effect of the major federal action. Hanly II, supra, at 830.

This brief considers the adequacy of agency impact assessment below in separate sections, and shows the Assessment in the instant case to have been inadequate, falling far short of the requirements of NEPA and the Special Regulations of the Postal Service, and thus making out an "arbitrary and capricious" case. The terms "arbitrary and capricious" are also considered, infra, in the context of the Administrative Procedure Act, wherein it is shown that this court should set aside the agency action under NEPA in the instant case as "arbitrary and capricious." In the subsection immediately following, it is demonstrated how and why this court should compel detailed NEPA review through the preparation of an EIS on the basis of the existence of significant controversy over the environmental impact of the proposed Postal Service action.

b. Conflicting Submissions by the Parties on the Environmental Merits as Grounds for Remand to the Agency for Preparation of an EIS.

Should the court reject review de novo on the basis of refusal to substitute its judgement on the merits for that of the agency, there is nonetheless a means of accomplishing review of agency threshold determinations not to prepare an EIS. In considering whether the agency has properly interpreted the statute and whether it exercised resonableness of judgment, the court may hold that conflicting submissions on environmental issues of substance should prove the need for a detailed impact statement. Thus the court should accept plaintiffs' affidavits, which allege substantial adverse en-

vironmental impact flowing from defendants' action, as proof of the "significance," "nontriviality," or "substantiality" of the action as a matter of law, even if contradicted by agency affidavits or negative declarations as to impact. This approach may at first blush appear to award too much to plaintiffs' merits by way of trial-by-affidavit; in actuality it combines the Supreme Court's approval of substantial inquiry into agency determination that a project is not "major" under NEPA, with an approach taken by district courts in Food and Drug Administration seizure actions. See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1972) and United States v. An Article of Drug... Mykocert, 245 F. Supp. 571 (N.D. Ill. 1972); AMP v. Gardner, 389 F. 2d 825 (2d Cir. 1968); see also Mashaw, "An Administrative Lawyer in the Wilderness of Environmental Law: Judicial Review of Compliance with NEPA," 4 ENVIRONMENTAL LAW REPORTER at 50147 (December, 1974).

In Mykocert, supra, the United States had seized a quantity of a prescription drug and sought a decree of condemnation on the grounds that the drug was a "new drug" and therefore its false and misleading labelling, and the absence of adequate directions for use, violated the "new drug" requirements of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §301 et seq. The pharmaceutical company which manufactured the drug filed a claim for the seized articles, alleging that Mykocert was not a new drug and that therefore its "non-newness" exempted it from the requirement that application be made for an exception from filing as a new drug. The decisive issue was whether or not the drug was "new" under the statute. The statute defined "new drug" as one which, based upon its composition, was one "not generally recognized, among experts qualified by scientific training and experience, to evaluate the safety and effectiveness of drugs, as safe and effective for use under the conditions prescribed, recommended or suggested in the labelling thereof."

21 U.S.C. §321. The court noted that the words "generally recognized" were "terms of art" which created interpretative problems. 345 F. Supp. at 574. It held that the defense to the "new drug" allegation could only succeed where the drug was recognized by experts in the field as safe and effective; that is, that it was generally recognized as such by relevant published medical or scientific literature, or by experts. The court also stated that it was difficult for it to acknowledge the "general recognition" of the drug in question when four medical experts swore in affidavits that it was not generally recognized as such. Id. at 575. The court stated that:

> While we do not express an opinion as to whether a "mere" conflict in expert opinion constitutes lack of general recognition, it cannot be denied that the affidavits of five of the leading doctors in the field which deny general recognition creates more than a "mere" conflict. It is inconceivable that a drug such as this could be considered generally recognized in the face of such learned nonrecognition. Id.

The court in Mykocert held that "based on all the documents and evidence submitted there is no general recognition among qualified experts that Mykocert as such is safe and effective," and that it was a "new drug" under the statute.

The broad problem faced by courts in such cases is when to grant relief on the basis of the "general-recognition, new drug" issue. Specifically, when conflicting affidavits all claiming expertise in the matter of a factual dispute passed upon by an administrative agency are submitted to a court, when is it appropriate to remand the disputed subject item to the agency for full evaluation and testing under the statute? The Second Circuit has held that where affidavits of experts showed that certain pharmaceutical products in dispute were not generally recognized among experts as safe and effective for use under the conditions prescribed, no genuine issue of fact remained to be tried. Hence, the products had to be submitted to the Secretary of Health,

Education and Welfare for a determination as to safety through adequate testing. AMP v. Gardner, supra; 389 F. 2d at 831. The Second Circuit did add that a genuine difference of opinion among experts is not necessarily indicative of ripeness for summary judgment; however, it did at least raise possibilities of factual issues and it may, as in the AMP case, warrant full administrative review. Id.

In the instant case, Plaintiffs have filed affidavits alleging that Defendants' action will, inter alia, cause irreparable environmental harm and produce serious adverse environmental impact. Affidavit of Thomas C. Dignan at 2, para. 61 Affidavit of John Stainton, at 2, para.2 and at 4, para.8. Various violations of NEPA are also alleged in these affidavits as are allegations of adverse impact upon the Plaintiffs themselves; e.g. there is an allegation of interference with Plaintiff Genessee-Finger Lakes Regional Planning Board's ability to carry out a planning mandate entrusted to it pursuant to a federal statute, the Intergovernmental Cooperation Act of 1968, 42 U.S.C. §4233. There are further allegations of the possible generation of undesirable social inequities. Affidavit of Stuart I. Brown at 6, Para.17-18.

In short, paraphrasing Mykocert, supra, the following dispute arises from the submission of conflicting expert opinion submitted by the parties: whether the proposed construction of the new Postal Service facility in Henrietta and the abandonment of the facility in Rochester is "generally recognized" as being environmentally "safe and effective" under the conditions set forth in the Assessment, or whether conflicting opinion on the impact of the facility when "marketed" upon the environment as it is currently "packaged" raises doubts as to allegations that the agency action is not "major," or "significant," and hence warrants effective administrative "testing" under the statutorily-prescribed standards of NEPA. Utilizing the reasoning of the

Second Circuit in AMP, supra, there is, at least, clearly a factual controversy, and it is to be resolved either by judicial inquiry or, more appropriately, by remand to the agency for further study.

It is, after all, clear that the words "major" and "significant" as used in NEPA, and the word "controversial" as used in the applicable Postal Ser - vice Special Regulations, 39 C.F.R. Part 775.4(4) create interpretative problems. There is no magic formula or system of pigeonholing available to resolve the issue. The statute does, however, require the agency to consider certain relevant factors, and this consideration is critical to the reasonableness of factual determinations under these ambiguous words. Where affidavits are submitted challenging existing conclusions about new actions, and Defendants cannot offer a complete record with supporting data to butress their own conclusions, then Plaintiffs' affidavits clearly point out the need for remand for complete review of environmental impact.

That the affidavits submitted by the Plaintiffs in the instant case are those of experts qualified to speak on the issue of environmental impact as to the City of Rochester and the geographical area in which the Planning Board exercises its function, cannot be disputed. Plaintiff Planning Board is the "designated area-wide clearinghouse" for purposes of implementation of the policies and requirements of the Intergovernmental Cooperation Act of 1968, supra. See Plaintiffs' Memorandum of Law at 24-25. The City of Rochester as a municipal corporation of the State of New York exercises broad police powers as granted under the NEW YORK STATE CONSTITUTION Art.IX §2(c) including the power to adopt and amend local laws, not inconsistant with the provisions of the Federal or State Constitutions, relating to "the government, protection, order, conduct, safety, health and well-being of persons or property therein." See also New York Municipal Home Rule Law Art.2 §10(1)(a)(11) which grants to

cities in New York the power to adopt and amend local laws, under the same conditions, relating to "(t)he protection and enhancement of its physical and visual environment." Expertise flows from the exercise of judgment in areas properly within the knowledge and function of the governmental body. We may note that somewhat less deference to environmental expertise is owed the Defendant Postal Service which, but for NEPA's mandate, does not in the usual course of business assess environmental consequences of its administrative activities. Far less deference to environmental expertise as a matter of law can be accorded the author of the Assessment, the "Cannon Partnership," which is neither a municipal corporation, nor an intergovernmental planning board, nor an administrative agency.

2. Judicial Review of the Agency's NEPA Action in the Context of the Administrative Procedure Act.

a. Scope of Review of Agency Action Under the APA.

The judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, permit, within certain limits, a broad review of administrative agency action for the purpose of determining whether the agency has carried out legislative tasks so as to negate the dangers of arbitrariness and irrationality. Automotive Parts and Accessories Association v. Boyd, 407 F.2d 330 (D.C. Cir. 1968). The reviewing court's power extends under APA §706(1) to compelling any agency action that is unlawfully withheld or unreasonably delayed, and under §706(2), holding unlawful and setting aside any action found to be:

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority or limitations, or statutory right;

(D) without observance of procedure required by law;
(E) unsupported by substantial evidence;
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

The APA provides recourse for persons, including corporations (5 U.S.C. §551) and thus presumably municipal corporations such as Plaintiff City of Rochester, who have suffered a legal wrong occasioned by agency activity, or who have been adversely affected or aggrieved by such action.

b. Review of the Postal Service's Action is Appropriate Under the APA.

While the APA's judicial review provisions do not apply where either (1) the statute on which the alleged right is based precludes judicial review or (2) agency action is committed to agency discretion by law, 5 U.S.C. §701, none of the exceptions apply in the instant case. Reviewability is the rule and is presumed, and nonreviewability is the exception to the rule and requires proof. Barlow v. Collins, 397 U.S. 159 (1970); Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970). NEPA does not bar judicial review either expressly or by implication. Further, reviewability of agency action under NEPA has been long established. Environmental Defense Fund, Inc. v. Corps of Engineers, 470 F. 2d 289 at 298-300 (8th Cir. 1972; courts have obligation to review substantive agency decisions on the merits, NEPA decisions included); Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 at 468-69 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972). Finally, agency action under NEPA is not exempted from judicial review on the basis of agency discretion under law since NEPA contains neither such broad statutory drafting as to preclude judicial application of legal principles, Citizens to Preserve Overton Park v. Volpe. supra, nor an inference of preclusion of judicial review based upon statutory use of permissive rather than mandatory language in addressing administrative agencies. Environmental Defense Fund, Inc. v. Har-

din, 428 F.2d 1093 (D.C. Cir. 1970); Barlow v. Collins, supra.

c. Review of Agency NEPA Action Under the APA.

Review of an agency's NEPA action under the APA is of course predicated upon procedural requirements of plaintiffs' standing and the ripeness of the issue for review, but these two requirements are met in the instant case. First, plaintiffs have alleged both injury-in-fact as to adverse impact upon environmental and economic interests (abandonment of Rochester Postal Facility upon readiness of Henrietta facility will cause urban degradation and blight), and injury to a cognizable interest "arguably within the zone of interests to be protected or regulated" by NEPA (adverse impact upon quality of human environment, alleged as to City of Rochester, and interference with regional planning function delegeated by law, alleged as to plaintiff Genessee-Finger Lakes Regional Planning Board). Plaintiffs' Memorandum of Law at 8-12. See Association of Data Processing Service Organizations v. Camp, supra. Second, the Postal Service's decision not to issue an EIS based upon the Cannon Partenership Assessment of 5 November 1974 represents "final Agency action" under NEPA. The agency action and procedure that is the subject of the instant case has reached a stage where judicial review will not disrupt the orderly process of factual adjudication, and where rights and obligations have been determined or legal consequences will flow from the agency action. Under the so-called "finality rule," the Postal Service's decision not to prepare an EIS is ripe for judicial review. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970).

d. The Action Taken by the Postal Service Should Be Set Aside Pursuant to the APA.

The decision of the Postal Service not to issue an EIS, and the determin-

ation in the Assessment that the proposed action would not have a significant environmental impact should be set aside pursuant to the provisions of the Administrative Procedure Act. It is established, infra at I(B)(1)(a)(iv), that the Postal Service's own Special Regulations demanded that an EIS be issued in the circumstances of the proposed action. Violation of these regulations, as well as violation of the mandate of NEPA, Executive Order 11514, and the Guidelines of the Council on Environmental Quality, as established in I(B) infra, make it clear that the Postal Service's action was arbitrary, capricious, an abuse of discretion, and without observation of procedure required by law.

It is the failure to observe lawful procedure that is especially significant in the instant case in the establishment of unlawfulness of the Postal Service's action under the APA. Through the promulgation of Special Regulations applicable to the instant case, the Postal Service has accepted as binding procedure full environmental review and disclosure prior to major action.

These Special Regulations are binding on the Postal Service notwithstanding the language of Part 775.1(b) relating to the inapplicability of NEPA to Postal Service functions, and the Postal Service as being in "voluntary" compliance with NEPA. In Accardi v. Shaughnessy, 347 U.S. 260 (1953), the Supreme Court held that regulations validly prescribed by a government administrator are binding upon him, and this principle holds even where the administrative action under review is discretionary in nature. In Service v. Dulles, 354 U.S. 363 (1956), the Supreme Court held that where an administrator's action did not comply with administrative regulations, that action could not stand under law. In Vitarelli v. Seaton, 359 U.S. 535 (1959), it was further held that administrative departure from departmental regulations was irregular.

The basic principle derives from Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1942), wherein the Court held that an executive

agency must be rigorously held to the standards by which it professes to be judged. 318 U.S. at 87-88. Further:

> An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand, and courts will strike it down. U.S. v. Heffner, 420 F.2d 809, 811 (4th Cir. 1970) citing Accardi, supra, and Vitarelli, supra.

The rule is applied in the Second Circuit even where the administrative agency claims that review principles under the APA do not apply to particular regulations because the regulations are "not binding." In Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968), vacated on rehearing on other grounds, 398 F.2d 718 (2d. Cir. 1968), the government's defense to a petition for habeas corpus by a naval reservist denied a conscientious objector discharge was that denial of conscientious objector status pursuant to Department of Defense Regulations was not open to attack as arbitrary and capricious because such status was granted under the regulations as a matter of "executive grace" rather than "right." The Second Circuit stated that:

> We recognize, of course, that...we are dealing with Department of Defense regulations rather than with a statute. We reach the same result, however, because a validly promulgated regulation binds the government as much as the individuals subject to the regulation; and this is no less so because the governmental action is essentially discretionary in nature. 398 F.2d at 715. See also Smith v. Resor, 406 F.2d 141 (2d Cir. 1969).

Thus, even though the determination of what is a "major action significantly affecting the environment" is left to administrative discretion based upon assessment of the circumstances and a resonably complete factual record, where the agency's regulations waive discretion as to certain actions and mandate nondiscretionary compliance with the full force and effect of statutory provisions, the agency is so bound. Under §775.4 of the Postal Service's Special Regulations, actions "which require environmental impact statements" include "any Postal Service program, activity or project which will have an actual or probable impact on the quality of the human environment (§775.4(a)(2));

and "(a)ny proposed action which is likely to be environmentally controversial." Actions "significantly affecting the human environment" include those that "may be localized in their effect, but nevertheless, have a harmful environmental impact," "(a)ctions which directly or indirectly affect human beings through, inter alia, pollution and undesirable land use patterns, and human population distribution changes and its effect on urban congestion and provision of public services." §775.4(b).

As will be shown, infra, the Postal Service's Assessment- or rather, the Cannon Partnership Assessment- failed to consider whether any or all of the factors listed in the Special Regulations, §775.4, were applicable, as to actual or even probable impact of the proposed action.

Further violation by the Postal Service of its own regulatory prescriptions is also apparent when the Assessment is weighed in relation to the requirements of the Special Regulations, Part 775.12, "Applicability to projects for construction of Postal Service facilities." This section applies to projects administered by the U.S. Army Corps of Engineers. We are not informed by the Cannon Partnership Assessment whether the Henrietta facility construction will be so administered. We may only assume that §775.12 is applicable as that section was promulgated for "construction of Postal Service facilities." At any rate, §775.12 states that, in accordance with an "agreement" of March 11, 1971 with the Corps, the Postal Service is to assemble internal administrative data pertinent to the preparation of assessments and impact statements. It is suggested that this data include information on the number of personnel to be employed and problems with vehicular traffic volume, but there is no stated restriction on the meaning of the words "all data available" to these factors. §775.12(a) adds that if the views of other agencies or private persons are known, these "should be appended." Such appending is not

stated as being limited to the EIS alone. The Assessment in the instant case is certainly not a record of available data from within the agency- as will be shown, infra, it is conclusory and based upon hypothesis- and it quite clearly did not attempt to ascertain the views of other Federal, state or local agencies, or of private persons or organizations interested in the project. The restricted scope of the Assessment, then, stands in violation of the administrative regulations, in accordance with which it should have been prepared.

B. There is a Strong Likelihood That Plaintiffs Will Prevail on the Merits.

1. The Defendants are Required by NEPA, as Implemented by Executive Order 11514 and the Guidelines of the Council on Environmental Quality, and by Their Own Special Regulations, 39 C.F.R. §775, to Prepare an Environmental Impact Statement Considering Both the Construction of a New General Mail and Vehicle Maintenance Facility, and the Abandonment of a Main Post Office.

a. NEPA, Executive Order 11514, CEQ Guidelines, and Postal Service Special Regulations.

i. NEPA.

Congress declared a national environmental policy when it enacted the National Environmental Policy Act of 1969. Among the purposes of this policy were to:

> ...encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.... NEPA, 42 U.S.C. §4321.

NEPA contains both a substantive policy declaration (§§101,102(1), 42 U.S.C. §§4331, 4332(1)) and procedural requirements incumbent upon "all agencies of the Federal Government..." (§102(2), 42 U.S.C. §4332(2)). It directs that "to the fullest extent possible... the policies, regulations and public laws of the United States shall be interpreted and administered in ac-

cordance with the policies set forth" in the Act. NEPA §102(1), 42 U.S.C. § 4332. Section 101(b) of NEPA, 42 U.S.C. §4331(b), requires a continuing responsibility to be exercised by the Federal Government, including Defendants, that being:

> to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may
>
> (1) fulfill the resposibilities of each generation as a trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural and other natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

The procedural obligations that must be met by all Federal agencies "to the fullest extent possible" are established in NEPA §102(2), 42 U.S.C. §4332. These procedures, which are the salient concern of the instant case, specify that:

> (A)ll agencies of the Federal Government shall...
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and,
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented...
>
> (D) study, develop and describe appropriate alternatives to

> recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;...

These action-forcing procedural duties are not discretionary. "The language of the Act clearly makes it applicable to all agencies of the Federal Government." Chelsea Neighborhood Associations v. U.S. Postal Service, 7 E.R.C. 1707, 1711 (S.D.N.Y. 1975), aff'd, 516 F.2d 378 (2d Cir. 1975). The Court of Appeals for the District of Columbia Circuit has held that:

> ...the Section 102 duties are not flexible. They must be complied with to the fullest extent, unless there is a clear conflict of statutory authority. Considerations of administrative difficulty, dely or economic cost do not suffice to strip the section of its fundamental importance. Calvert Cliffs' Coordinating Committee v. A.E.C., 449 F.2d 1109, 1115 (D.C. Cir. 1971).

The same Circuit has also held that:

> It is now clear that an agency's duty to issue an environmental impact statement on a project and to consider environmental factors at each stage of agency decision making as to that project are not inherently flexible or discretionary. Scientists' Institute for Public Information, Inc. v. A.E.C., 481 F.2d 1079, 1091 (D.C. Cir. 1973).

The careful and informed decision-making process mandated by NEPA has not been carried out to any extent by the Defendants as to the Henrietta postal facility and the threshold impact determination procedure incidental thereto.

ii. Executive Order 11514.

Executive Order 11514, 35 Fed. Reg. 4247, March 5, 1970, implements and furthers the policy and purpose of NEPA, by ordering the Federal Government, including the Defendants, to "provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life." It commands the heads of Federal agencies to develop procedures "to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with environmental impact in order to obtain the

views of interested parties," such procedures to provide the public with "relevant information, including information on alternative courses of action." The Federal agencies are also ordered to "(i)nsure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies, States, counties, municipalities, institutions, and other entities, as appropriate."

In Vitarelli v. Seaton, supra, the Supreme Court held that administrative noncompliance with an Executive Order mandating certain procedure rendered agency action in matters pertinent to the Order illegal and of no effect.

While indeed, Defendants have available to them appropriate agency orders and regulations issued pursuant to Executive Order 11514, they have failed to comply with them as mandated by the Executive Order and in so doing have violated the command of the Executive Order.

iii. CEQ Guidelines.

The Council on Environmental Quality (CEQ) is charged under NEPA, Subchapter II, 42 U.S.C. §4344, and Executive Order 11514, with the administration of the Act and is responsible for the implementation of its provisions on environmental impact statements. The duties of the CEQ include the preparation of an environmental quality report, the preparation of recommendations to the President on national policies for improving environmental quality, the analysis of conditions and trends in environmental quality, the conducting of environmental quality investigations and the appraisal of the effect of Federal programs and activities on environmental quality. To fulfill its responsibilities, the CEQ has issued "Guidelines for the Preparation of Environmental Impact Statements," 38 Fed. Reg. 20550-20562, August 1, 1973, 40 C.F.R. 1500 (1975) for the Federal agencies in their own fulfillment of NEPA responsibilities.

The CEQ Guidelines provide, in pertinent part:

§1500.2 Policy.

(a) As early as possible and in all cases prior to agency decision concerning recommendations or favorable reports on proposals for... major Federal actions significantly affecting the quality of the human environment... Federal agencies will, in consultation with other appropriate Federal, State, and local agencies and the public assess in detail the potential environmental impact.

(b) Initial assessments of the environmental impacts of proposed action should be undertaken concurrently with initial technical and economic studies and, where required, a draft environmental impact statement prepared and circulated for comment in time to accompany the proposal through the existing agency review processes for such action. In this process, Federal agencies shall: (1) Provide for circulation of draft environmental impact statements to other Federal, State and local agencies and for their availability to the public in accordance with the provisions of these guidelines; (2) consider the comments of the agencies and the public; and (3) issue final environmental impact statements responsive to the comments received. The purpose of this assessment and consultation process is to provide agencies and other decision-makers as well as members of the public with an understanding of potential environmental effects of proposed actions, to avoid or minimize adverse effects wherever possible, and to restore or enhance environmental quality to the fullest extent practicable. In particular, agencies should use the environmental impact statement process to explore alternative actions that will avoid or minimize adverse impacts and to evaluate both the long and short-range implications of proposed actions to man, his physical and social surroundings, and to nature. Agencies should consider the results of their environmental assessments along with their assessments of the net economic, technical and other benefits of proposed actions and use all practicable means, consistent with other essential considerations of national policy, to restore environmental quality as well as to avoid or minimize undesirable consequences for the environment.

§1500.4 Federal agencies included; effect of the Act on existing agency mandates.

(a) Section 102(2)(C) of the Act applies to all agencies of the Federal Government. Section 102 of the Act provides that 'to the fullest extent possible: (1) The policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act,' and section 105 of the Act provides that ' the policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.' This means that each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives.

In accordance with this purpose, agencies should continue to review their policies, procedures and regulations and to revise them as necessary to ensure full compliance with the purposes and provisions of the Act. The phrase, 'to the fullest extent possible' in section 102 is meant to make clear that each agency of the Federal Government shall comply with

that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

§1500.6 Identifying major actions significantly affecting the environment.

(a) The statutory clause 'major Federal actions significantly affecting the quality of the human environment' is to be construed by agencies with a view to the overall, cumulative impact of the action proposed, related Federal actions and projects in the area, and further actions contemplated. Such actions may be localized in their impact,' but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases...an environmental statement should be prepared if it is reasonable to anticipate a cumulatively significant impact on the environment from Federal action... Finally, the action must be one that significantly affects the quality of the human environment either by directly affecting human beings or by indirectly affecting human beings through adverse effects on the environment.

In assigning the views of the CEQ more than nominal consideration, the Second Circuit held that

> While the(CEQ) Guidelines are merely advisory and the CEQ has no authority to prescribe regulations governing compliance with NEPA, we would not lightly suggest that the Council, entrusted with the responsibility of developing and recommending national policies 'to foster and promote the improvement of environmental quality," NEPA §204, 42 U.S.C.A. §4344, has misconstrued NEPA. Greene County Planning Board v. F.P.C. , 455 F.2d 412, 421 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972).

It has long been the rule that when faced with a problem of statutory construction, courts show great deference to the interpretation given the statute by the officer or agency charged with its administration. Where an Executive Order delegates responsibility for the administration of an Act to that officer or agency, the reasonableness of the officer's or agency's interpretation of the statute follows a fortiori from the reasonableness of the construction given to the Executive Order. Udall v. Tallman, 380 U.S. 1 (1965). Since the reasonableness of the CEQ Guidelines is not an issue in the instant case, their prescriptions and interpretations are entitled to great weight and are strongly persuasive of what NEPA requires of the Defendants. The CEQ'a interpretation of NEPA should not be ignored except for the strongest reasons

because its construction of NEPA is pursuant to its authority. Environmental Defense Fund v. Tennessee Valley Authority (Tellico Dam), 325 F. Supp. 728 (E.D. Ark. 1971). Further, when the CEQ Guidelines have been incorporated verbatim or in principle into the agency regulations they must be accorded even greater weight because a government agency is bound by its own regulations.(See infra at I(B)(1)(a)(iv), "Postal Service Special Regulations" for a more complete discussion on the force and effect of promulgated regulations.)

iv. Postal Service Special Regulations.

The Postal Service's"Special Regulations, Part 775- Environmental Statement Procedures," (Special Regulations), 39 C.F.R. §775 (revised as of July 1, 1975) were promulgated pursuant to 39 U.S.C. §401(2), which confers upon the Postal Service the power to adopt rules and regulations as it deems necessary to accomplish the objectives of Title 39 (Postal Reorganization Act of 1970). These objectives, as set forth in 39 U.S.C. §101, "Postal Policy," include the furnishing of effective and regular postal services to all communities, functioning properly as a federal employer, establishing postal rates through fair and equitable apportionment to all users of the mails, expediting the service of important letter mail, and utilization of modern methods of mail transportation to achieve overnight mail carriage. 39 U.S.C. §101(a-f). It also includes the following goal:

> In planning and building new postal facilities, the Postal Service shall emphasize the need for facilities and equipment designed to create desirable working conditions for its officers and employees, a maximum degree of convenience for efficient postal services, proper access to existing and future air and surface transportation facilities and control of costs to the Postal Service. 39 U.S.C. §101(g).

Section 410(a) of the Postal Reorganization Act of 1970 provides:

> Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in

> force as rules or regulations of the postal service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

Taking this exception as a generous one, the Postal Service's Special Regulations, §775.1(b), concluded that NEPA, as well as other Federal anti-pollution laws. was included in the language of 39 U.S.C. §410(a), and thus NEPA was inapplicable to the exercise of Postal Service powers; that is, NEPA did not impose ministerial duties upon the Postal Service. This contention was expressly rejected by the Second Circuit in Chelsea Neighborhood Associations v. U.S. Postal Service, 516 F.2d 378 (2d Cir. 1975) wherein it was held that (1) NEPA could not properly be characterised as a "law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds," and thus the §410 exemption did not apply to NEPA requirements (516 F.2d at 383); and (2)the intent of §410(a) was not to relieve the Postal Service of environmental statement duties under NEPA but rather to allow the Postal Service to function in a businesslike manner with modernized daily operations. Id. Since the Postal Reorganization Act was managerially oriented, and NEPA was policy oriented, there is no interference with Postal Service function. Rather, NEPA requires "a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations." Calvert Cliffs' Coordinating Committee v. A.E.C., supra. NEPA does not itself require specific results; those are still left to the agency after the proper review procedure has been followed. Chelsea, supra; 516 F.2d at 384.

The Postal Service has preserved its insistence on exclusion from NEPA in the revised Special Regulations as of July 1, 1975 (Chelsea was decided by the Second Circuit on April 30, 1975). Nevertheless, the Special Regulations provide that the Postal Service will voluntarily comply with the Act's requirements "to the extent practical and feasible consistent with the public

interest and fulfillment of the primary mission of the Postal Service." 39 C.F.R. §775.1(b).

General policy under the Special Regulations includes (1) assessing the "environmental consequences of any proposed major action" at the "earliest practicable stage in the planning process;" (2) insofar as practicable, avoiding adverse effects on the quality of the human environment or, where not feasible, taking "all reasonable measures...to neutralize or mitigate any adverse environmental impact of the actions;" (3) preparing a detailed EIS whenever the environmental assessment indicates "that the resulting action may significantly affect the quality of the human environment or may be highly controversial with regard to environmental impact..." 39 C.F.R. §775.1(b).

The Special Regulations define "Environmental Assessment" as:

> An evaluation process to determine whether a proposed major action is expected to have a significant impact on the environment. 39 C.F.R. §775.2(a).

"Negative Declaration" is defined in §775.2(b) as:

> (A) written description of a proposed action, its expected environmental impact, and the basis for the conclusion that no significant adverse impact on the environment is anticipated if the proposed action is undertaken.

It is the responsibility of each head of a Postal Service organization unit to determine whether or not a proposed action is a major action under criteria set forth in §775.4 of the Special Regulations and if so, to prepare either a negative declaration or EIS. 39 C.F.R. §775.3(a). Although the "publicizing" of such a decision is necessary only as to major actions resulting in significant environmental impact (§775.3(a)(iv)), the duty of "reevaluating each major action in the light of comments received from Federal, state, and local entities and private organizations and individuals" is not so restricted; this duty appears to apply to all major actions regardless of whether impact is "significant."

The determination of what is a major action significantly affecting the quality of the human environment is stated in the Special Regulations to be "in large part a matter of judgment based upon an assessment of the circumstances of the proposed action," 39 C.F.R. §775.4, but major actions which do require an EIS include: (1) any Postal Service program, activity or project which will have an actual or probable impact on the quality of the human environment, §775.4(a)(2); (2) any proposed action which is likely to be environmentally controversial, §775.4(a)(4). "Actions significantly affecting the human environment" are stated in §775.4(b) of the Special Regulations to be capable of being construed as those actions that:

> (1)Degrade environmental quality even if beneficial effects outweigh the detrimental ones;
> (2) Curtail range of possible beneficial uses of the environment including irreversible and irretrievable commitments of resources;
> (3) Serve short-term rather than long-term environmental goals;
> (4) May be localized in their effect, but nevertheless have a harmful environmental impact; or
> (5) Are attributable to many small actions, possibly taken over a period of time, that collectively have an adverse impa ct on the environment.

The Special Regulations §775.4(c) also discuss "(e)nvironmental subject areas" meaning, presumably, areas of concern to which the section refers when it states that the determination of what is a major action significantly affecting the quality of the human environment is a matter of judgment based on an assessment of the circumstances of the proposed action. These areas are stated to include:

> (1) Actions which directly and indirectly affect human beings through water, air and noise pollution, undesirable land use patterns, solid waste disposal, pesticide and herbicide use, and transportation and handling of hazardous materials;
> (2) Human population distribution changes and its effect upon urban congestion (including vehicular traffic), water supply, sewage treatment facilities, other public services, and threats to health, and,
> (3) Ecological systems such as wildlife, fish and other marine life.
>
> 39 C.F.R. §775.4(c).

The Postal Service's Assessment- or rather, the Cannon Partnership Assess-

ment- in the instant case is, in actuality, a "negative declaration" under its own definition. Special Regulations §775.2(b). This is because it purports to be more than a simple evaluation. It describes the project and goes beyond mere evaluation of the project alone insofar as it at least pays lip service to "alternates" and the environmental setting without action. Under the standards set forth in the Special Regulations, therefore, the document should also have set forth a basis for its conclusion that there will be no significant impact. As this Brief notes, Infra, the Assessment is inadequate because it is conclusory, and no environmental record is provided that would justify such conclusions as absence of alternate sites, such assumptions as the provision of mitigating measures to reduce the impact of traffic congestion and oil/gasoline runoff into Allen Creek, and such conclusions as no significant adverse impact absent consideration of the Rochester facility abandonment phase of the proposed action. No basis for the conclusion of absence of significant impact is provided.

Further agency violation of its own regulations is clear in light of the failure of the Postal Service to reevaluate its proposed action in the light of comments and opposition communicated to the Postal Service by the Plaintiffs prior to and following the issuance of the Assessment. This critical input, it should be noted, was generated in spite of the Postal Service's failure to communicate, clearly or timely, information regarding the proposed action to Plaintiffs. Section 775.3(a)(iv) of the Special Regulations were, therefore, violated by the Postal Service.

Since, as established infra, the action in question here was environmentally controversial, an EIS was required under Special Regulations §775.4(a)(4). Further, since even the Assessment notes that the activity will have actual or probable impact on the human environment, an EIS should have been prepared

in accordance with Special Regulations §775.4(a)(2): see Assessment at 4.2 (runoff of grease, oil and gasoline drippings from Vehicle Maintenance Facility into Allen Creek "may be of large enough quantities to cause a problem"); see also Assessment at 4.1 as to possible "degradation of ambient air quality" during construction of the facility, and 4.3 as to permanent destruction of wildlife habitat.

Finally, a failure by the Postal Service to adhere to its own definition of "significant" major actions, in adopting the conclusion of the Assessment that there would be no adverse effect, violates the Special Regulations. The Assessment, for example, admits an irreversible and irretrievable commitment of resources at 4.3 (biological resource commitments) and at 4.2 (affects on water table, and drainage and runoff patters from the grading of a large portion of the construction site). Viewed from the limited scope of the Assessment alone, notwithstanding the unconsidered impacts of the proposed project, such as the abandonment of the existing Rochester facility upon completion of its substitute facility in Henrietta, an EIS should have been prepared given the clear significance of the action in question. See Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973)where it was stated that problems such as storm water runoff from government building and parking lots and problems of traffic are problems which ordinarily call into play the EIS issuance requirement of NEPA Section 102.

b. Defendants' Assessment of the Proposed Postal Facility is Inadequate and Unacceptable.

i. Scope and Purpose of Pre-EIS Environmental Review Process

The purpose of pre-EIS environmental impact review is twofold: (1) to examine the type, magnitude and location of a project so as to determine its potential significant impact on the environment; (2) to screen those projects requiring the full detailed EIS from those that, due to nonsignificance, do not require such a filing. See Robert W. Burchell and David Listokin, The Environmental Impact Handbook, Center for Urban Policy Research, Rutgers- The State University of New Jersey, New Brunswick, N.J., 1975 at 60. The format of pre-EIS review can be divided into five parts. The analysis must first discuss the existing environmental situation and consider such issues as current area trends without the proposed project, and environmental conditions existing prior to the project. The second step is a sketch of likely environmental impacts occasioned by the project, together with a gross estimation of the magnitude of these impacts. Third, the analysis should proceed to consider the feasibility of eliminating or minimizing identified impacts via project changes. Discussion of project alternatives as to site, design and action versus no-action are appropriate at this point. The fourth step in the pre-EIS analysis procedure is a determination of the project's environmental impact, based upon the facts elicited in the first three steps; that is, whether or not the proposed project is "a major action significantly affecting the qulity of the human environment." Finally, the fifth step is the determination of whether or not the proposed project actually requires an EIS, and the giving of notice of intent to file or not to file an EIS.

ii. Defendants' Assessment is Conclusory and Self-Serving

The most cursory analysis of the Assessment of the Postal Service's proposed Henrietta postal facility reveals that it is inadequate in scope and detail to pass muster under pre-EIS review standards. On its face, it is deficient because it neither discusses nor analyzes the environmental impact of the proposed project on the City of Rochester. Quite clearly the replacement of an existing facility with a new facility impacts upon the environment of the existing site or environment through abandonment of that existing facility when agency relocation time arrives. As is noted infra, the relevant factors lurking in the background of the Henrietta relocation include abandonment of the existing Rochester facility. It is arbitrary and capricious for the Postal Service qua Assessment promulgator not to take into account all relevant factors in reaching its conclusions. Citizens to Preserve Overton Park v. Volpe, supra; 401 U.S. at 416.

The Assessment identifies significant probable environmental impacts even for the limited impact area considered. These include problems relating to the pollution of Allen Creek from storm water, oil, gasoline and grease runoff from the project site, as well as problems of air pollution and traffic congestion. Mitigating measures are discussed to some extent. Yet the Assessment's treatment of both problem and solution is couched in perfunctory and conclusory language without supportive or descriptive data on the functioning or feasibility of proposed mitigation measures. For example, at page 4.4 the Assessment admits that the proximity of a residential area requires that the project include "some sort of acoustical screen" and mentions the possibility of using a line of trees. However, nowhere in the Assessment is the feasibility of actually producing an acoustical screen discussed. Alternative mitigation measures are not discussed as to the acoustical issue. There is not a citation to any successful mitigation of a similar noise problem through the use of

a line of trees or other alternative mitigating measures. Nor does the Assessment indicate whether the Postal Service is actually committed to the suggested mitigation. What we have, therefore, are hopes and promises and good intentions, but no data and no facts. Even if it is accepted arguendo that a detailed quantitative analysis is not required in an Assessment, certainly no meaningful decision with respect to so insidious a problem as noise can be made without some qualitative discussion of the realistic possibilities of noise abatement. Furthermore, even if a treeline will work, for how many years, it would be interesting and useful to know, would adjoining homeowners have to suffer until the trees grow large enough to serve their noise-abating affect? The absence of anwers to even this rudimentary sort of question renders threshold determinations on the significance of environmental impact meaningless. In The Conservation Society of Southern Vermont, Inc. v. Volpe, 343 F. Supp. 761 (D.C. Vt. 1972), Circuit Judge Oakes stated that where there was no problem of pendency of the project, "if there has been any substantial showing of potential serious environmental harm, an impact statement must be filed." 343 F. Supp. at 767. The court there held that plans to widen Route 7 did require an EIS in areas where ponds and hills might be unnecessarily endangered, at least when the project had not progressed so far as to make any delay economically substantial. The importance of the environmental impact was stressed by the Southern District Court in New York in Citizens for Clean Air, Inc. v. Corps of Engineers, 349 F. Supp. 696 (S.D.N.Y. 1972). Although not necessary to the holding that the Corps of Engineers had fragmented a project in a way that violated NEPA, the court did issue dictum that the preparation of an EIS might be delayed early in planning in a case where "the federal involvement or approval is slight and the impact on the environment is de minimis." 349 F. Supp. at 708 (emphasis added). However, where plaintiffs have "raised substantial environmental issues concerning the proposed recommended project. . . , the court

should proceed to examine and weigh the evidence of both the plaintiff and the agency to determine whether the agency reasonably concluded that the particular project would have no effects which would significantly degrade our environmental quality." Save Our Ten Acres v. Kreger, 472 F.2d 463 at 467 (5th Cir. 1973).

In dealing with this need for a "substantial showing" of environmental impact in Simmans v. Grant, 370 F. Supp. 5 (S.D. Texas 1974), where a class action to enjoin further construction of a channel improvement project in a slough area failed despite the lack of a negative declaration by the Soil Conservation Service (a federal agency), the court reviewed the question of the burden of proof for such a showing:

> The law is not settled as to which party bears the burden of proof in environmental cases in which a federal agency determines that no impact statement is required. The Fifth Ciruit Court of Appeals has placed the initial burden upon the plaintiff to show some deficiency before judicial action is appropriate. [citation omitted] . This Court concludes that in this type of case,... the burden of proof should initially rest upon the plaintiff to make a prima facie showing that the Federal agency has failed to adhere to the requirements of NEPA. Once this has been done the burden will shift, as a general rule, to the federal agency which possesses the labor, public resources, and expertise to make the proper environmental assessment and to support it by a preponderance of the evidence. 370 F. Supp. at 12 (emphasis added).

The District of Columbia Court of Appeals pinpointed the obligations of the Postal Service in making its decision that an EIS was not required, in Maryland-National Capital Park and Planning Commission v. U.S. Postal Service, supra;

> We believe that an 'assessment' statement must provide convincing reasons why a construction project with 'arguably' potentially significant environmental impact does not require a detailed impact statement. In this sense we agree with both the majority and the dissent in Hanley [sic] II, supra. We agree with Judge Friendly's dissent that in cases of 'true insignificance' an impact statement is not required, and, thus when there are 'arguably' cases of true significance, an impact statement is required. 471 F.2d at 837. On the other hand, we can rely on a review of the record, here consisting of the 'assessment' as supplemented by other submissions to NCPC National Capital Park

> and Planning Commission , to determine whether the agency has supplied convincing reasons why potential impacts are truly insignificant. 487 F.2d at 1039-40 (emphasis added).

As such convincing reasons were conspicuously absent in the discussion of noise impact, so too are they absent in the Assessment's discussion of traffic volume as related to air quality. On page 2.7 of the Assessment, the automobile is identified as the primary mode of transportation in the area of the Henrietta facility. On page 4.5 the document admits that "(i)n total, a large volume of traffic will be generated" by the new facility. Yet on page 4.1, the conclusion that "flows" from this, stated with no meaningful basis for testing its validity or reasonableness, is that air quality in the area will not be further degraded by this substantial increase in traffic. In the Maryland-National Capital case, supra, the discussion of traffic in the Assessment was held to be adequate because it specifically included as air quality control strategy the purchase of nonleaded gasoline and the fitting of Postal Service vehicles with the "California Control Package" emissions control device. In the Assessment in the instant case, not even the most rudimentary specifics of air pollution control or vehicle emissions control were recited. It is further apparent that vehicular air pollution will be contributed by the cars driven to and from the facility by its employees. We may assume that if the Rochester facility employs 1400 persons, there will be approximately that many employees at the facility in Henrietta, and a substantial number of automobiles. Certainly the gratuitous comment in the Assessment that emission control devices will preserve the quality of the air around Henrietta cannot be extended to these privately owned cars unless the Postal Service is contemplating a substantial enlargement of its sphere of activity.

The standard of judicial review of whether the agency has supplied convincing reasons why potential impacts are truly insignificant and therefore,

not requiring an EIS was stated in Maryland-National Capital to consist of three basic questions:

(1) "Did the agency take a 'hard look' at the problem, as opposed to bald conclusions, unaided by preliminary investigation?"
(2) "Did the agency identify the relevant areas of environmental concern?"
(3) "as to problems studied and identified, does the agency make a convincing case that the impact is insignificant?" 487 F.2d at 1040.

The court in Maryland-National Capital held that the preparation of two rather complete studies by a private consultant as well as by a federal agency (The Army Corps of Engineers) compelled a positive response to the first question concerning the "hard look" at the problem. (In the instant case there is one inc omplete private consultation assessment). The court noted that the resolution of the third issue, as to the agency's "convincing case," rested on whether the agency had "convincingly established" that changes in the project "have sufficiently minimized" identified significant impacts, such as oil and gas runoff and traffic congestion. The court held that suggested changes in the proposed project were not legally adequate to avoid the EIS issuance reqirement unless it was evident that such impact as remains after the changes are implemented would not be significant. Id. The case was remanded to the district court for findings of fact on whether the potential problems of water and gas runoff compelled the conclusion that an EIS was required. The Assessment alone, however, did not convince the court that an EIS was not necessary.

iii. Defendants' Assessment Fails to Set Forth Alternatives to the Proposed Action

Section 5.1 of the Cannon Partnership Assessment for the proposed Henrietta Postal Facility states as to alternate sites that:

> Alternate locations for the proposed project were not within the realm of this study. The project site is the only one known, and therefore, evaluated.

Further "consideration" of alternatives to the proposed action was restricted to a paragraph summarizing the consideration of alternative site configuration, and building location and orientation within the site. Alternative action possibilities for provision of General Mail Facility and Vehicle Maintenance Facility operations and services, including no action or use of the present Rochester facilities or expansion of the same, were not considered. In effect, the Assessment dismisses the existence of alternatives to the proposed action.

> "(I) n the context of legislation that requires federal agencies to affirmatively develop a reviewable environmental record, even where the agency determines that an Environmental Impact Statement is not required, a perfunctory and conclusory statement that there are no alternatives does not meet the agency's statutory obligation under NEPA, §102. Trinity Episcopal School Corporation v. Romney, supra, 523 F.2d at 94.

In Trinity, the federal agency (HUD) had concluded that an EIS was not necessary in its intial study of a proposal to change an urban renewal plan so as to convert a certain site to public housing. Instead the agency had issued a "Special Environmental Clearance" which, according to administrative procedure, involved more detailed and stringent review than the threshold determination contained in a "Normal Environmental Clearance" but which differed from an EIS in that it did not involve formal review by other agencies. In spite of the fact that the agency had not relegated review to the lowest and simplest review stage and had given consideration to impact factors, this level of agency review still fell short of compliance with NEPA:

> ...all agencies of the Federal government shall... (D) Study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternate uses of available resources. 42 U.S.C. §4332(2)(D), NEPA §102(2)(D).

The HUD "clearance" had failed to set forth in sufficient detail a consideration of alternatives to the proposed action. NEPA §102 is, in general,

a mandate to all federal agencies to consider environmental values at every distinctive and comprehensive stage of the agency's procedure on a course of action. Greene County Planning Board v. FPC, supra. As the Second Circuit noted,

> (t)he requirement for a thorough study and a detailed description of alternatives, which was given further congressional emphasis in §4332(2)(D), is the linchpin of the entire impact statement. Without the detailed statement, the conclusions and decision of the agency appear to be detached from and unrelated to environmental concerns. Monroe County Conservation Council, Inc.,v. Volpe, 472 F.2d 693, 697-98 (2d Cir. 1972), citing CEQ Guidelines, 6(iv), 36 Fed. Reg. 7724, 7725 (1971): "A rigorous exploration and objective evaluation of alternative actions that might avoid all or some of the adverse environmental effects is essential."

The Second Circuit remanded the Trinity case to the District Court for the fashioning of an appropriate order requiring the agency to consider reasonable alternatives to the development of the particular site in question. 523 F.2d at 95.

Clearly, alternatives to the proposed action constitute relevant factors critical to the reasonableness of the agency's threshold dtermination whether or not to prepare an EIS.

> Without a more detailed analysis of the rejected alternatives the community and other agencies will have no way of passing on the validity of the Services' conclusions." Chelsea Neighborhood Association v. U.S. Postal Service, supra, at 389 (2d Cir. 1975).

It is arbitrary and capricious for an agency not to take into account all relevant factors in making its determination. Citizens to Preserve Overton Park v. Volpe, supra, 401 U.S. at 416; Hanly v. Mitchell (Hanly I), 460 F.2d 640, 648 (2d Cir. 1972). If NEPA is taken to be "an environmental full disclosure law", Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749, 759 (E.D. Ark. 1971), and if the primary purpose of NEPA is to "compel federal agencies to give serious weight to environmental factors in making discretionary choices," see Monroe County Conservation Council, Inc. v. Volpe, supra, 472 F.2d at 697; Calvert Cliffs Coordinating Committee v. A.E.C., supra, 449 F.2d at 1111, then Defendants' adoption of the token

and conclusory efforts by the Assessment author at discussion of reasonable alternatives to the proposed action does not constitute full compliance with the statute. That there are "unresolved conflicts concerning alternate uses" within the meaning of §102(2)(D) is clear from the obvious conflict between the allegations of impact in Plaintiffs' Affidavits and Defendants' Assessment. See Amicus Brief, I(A)(1)(b), supra, "Conflicting Submissions by the Parties on the Environmental Merits as Grounds for Judicial Remand to the Agency for Preparation of an EIS."

iv. Defendants Have Improperly Segmented Their Impact Analysis

By failing to assess the impact of the proposal to move its main mail handling facility from Rochester to Henrietta upon the abandoned agency site itself (the City of Rochester), defendants have improperly "segmented" their proposed action and considered only one segment of the overall scheme.

This case presents a novel segmentation problem because the initial affirmative federal action of putting into operation a new main Postal Service Facility in Henrietta will lead to subsequent negative Federal action through the closing of the main post office in Rochester. Usually, segmentation cases involve public works projects such as highways or dams. The analysis developed by the courts in cases concerning such projects has concentrated on the relation between the initial project of known dimensions, and the consequent construction programs for which accurate impact assessment is difficult and obscure in the distant future. In the instant case, however, as as shown more fully, infra, (abandonment as a major federal action impacting significantly on the human environment), the impact of the consequent action- that is, the Rochester facility abandonment- is predictable with the same degree of certainty as the initial action of building the facility. It

is appropriate to apply the standards developed in other segmentation cases, however, insofar as those cases propounded criteria for evaluating agency action divisible into smaller parts.

NEPA plainly mandates comprehensive consideration of the effects of all Federal actions. NEPA, §102(a), 42 U.S.C. §4332(a). To permit noncomprehensive consideration of a project divisible into smaller components, each of which taken alone has nonsignificant impact, but which when taken as a whole has cumulative significant impact, would provide an escape hatch through which agencies could avoid their responsibilities under NEPA. Sierra Club v. Morton, 514 F.2d 856 (D.C. Cir. 1975).

The CEQ Guidelines clearly expect that an agency will consider "the overall, cumulative impact of the action proposed, related Federal action and projects in the area, and further actions contemplated." 40 C.F.R. §1500.6(a) (1974).

By limiting its consideration of environmental impact significance to only the construction of the new facility at Henrietta, the Postal Service has attempted to avoid its responsibility under NEPA to consider the cumulative impact of contemplated and related "further" actions, to wit, the abandonment of the Rochester facility.

In Scientists' Institute for Public Information v. A.E.C., supra, it was held that a Federal agency must consider the impact of an overall program and not merely the isolated aspects of a single facility. 481 F.2d at 1086-87. This holding is consonant with the general philosophy underlying NEPA, which seeks to avoid piecemeal future action through proper analysis in the present.

> The concept of segmentation encompasses more than prohibiting the mere artificial division of the program, it also requires that the courts guard against an agency's considering only the immediate impact of the first step in a program. The intent

> of Congress was to have NEPA effect the earliest deliberations of proposed actions. Therefore, even though future action has not yet been finalized, if it is envisioned then the agency must consider the impact of subsequent actions in furtherance of the program. Atchison, Topeka and Santa Fe Railway Co. v. Callaway, 382 F. Supp. 610, 621 (D.D.C. 1974).

Of course, there are programs so compartmentalized that segmentation is permissible in spite of the possible cumulative effects of its component projects. Sierra Club v. Callaway, 499 F.2d 982 (5th Cir. 1974). However, in that case, the scope of the initial project (only two percent of the total program), the timing of the projects, the independent utility of the component projects and the separate congressional funding of the initial project all joined to make segmentation a rational decision. Id. at 987. Because in the instant case the consequent action is an abandonment, the analysis cannot be performed in terms of the factors in Sierra Club v. Callaway. However, there is no doubt that the timing of the abandonment is critically dependent upon the timing of the completion of the Henrietta facility, that the abandonment has no independent utility or justification without the new facility, or that the scope of the abandonment action is a substantial part of an entire program.

Other courts have looked to an increment test to determine if segmentation is permissible. See, e.g., Sierra Club v. Stamm, 507 F.2d 788, 793 (10th Cir. 1974). There is no question here that the construction of the new facility and the abandonment of the Rochester facility are incremental steps in a single program to transfer the bulk of regional mail handling out of Rochester and into the suburbs.

Perhaps a more relevant guideline for the instant case is the test set out in Friends of the Earth v. Coleman, 513 F.2d 295, 299 (9th Cir. 1975), where the court said:

> The proper test, we believe, does not depend on the interrelation of the projects per se. Rather it depends on whether completion of

one project will inevitably involve an 'irreversible and irretrievable commitment of resources' to the second.

Once the Henrietta facility is completed there will be an "irresistable urge" to close the existing Rochester facility. Obviously, the Rochester facility will be "surplus" Postal Service property. Abandonment will follow just as surely as deterioration of inner city Rochester will follow abandonment.

c. Abandonment of the Rochester Postal Service Facility is an Integral Component of the Overall Action Plan, is a Major Federal Action Having a Significant Impact on the Human Environment, and Requires and EIS.

i. Abandonment is Integral to Defendants' Proposed Action.

Abandonment of the main post office in Rochester is causally connected to the construction of the new facility at Henrietta. The new facility at Henrietta is designed as a replacement of that older, urban facility, and the removal of operations from the Rochester to the Henrietta facility will occur upon completion of construction and operational preparation of the new facility. The size and capacity of the new facility as well as written statements by Postal Service officials clearly show that the new facility is indeed contemplated as a replacement for the Rochester facility.

Even though the Postal Service has not officially linked the construction of the new facility to abandonment of the existing facility, this court is not constrained in its search for the actual parameters of the Federal action in question:

> As a minimum, the courts must reserve the right to analyze federal actions to determine if, in fact, a comprehensive program, however labeled, is underway or proposed. Sierra Club v. Morton, supra; 514 F.2d at 873.

Thus, if upon review this court finds that the abandonment of the Rochester main post office is indeed the logical consequence of the construction of the new facility at Henrietta, then this court should and can find that these two sequential actions are really components of a comprehensive program; consequently, it may direct the Postal Service to consider them as such. NEPA has declared as Federal policy that Federal agencies must "use all practicable means...to improve and coordinate Federal plans, functions, programs and resources" in order to protect the environment. 42 U.S.C. §4331(a). This substantive pro-

vision of the federal law creates a substantive duty on the agency to consider separate parts of a program together, and violation of this duty may justify this court's requiring that the agency do so. Sierra Club v. Morton, supra; 514 F.2d at 874.

ii. The Abandonment Contemplated is a Major Federal Action Significantly Affecting the Human Environment.

NEPA is not limited to positive Federal agency actions such as the construction of the new facility at Henrietta. Negative federal actions, such as the denial of a certificate to build a gas pipeline, Arizona Public Service Company v. F.P.C., 483 F.2d 1275 (D.C. Cir. 1973) and approval of abandonments, e.g. abandonment of a stretch of railway track, City of New York v. United States, 337 F. Supp. 150 (E.D.N.Y. 1972)(3-judge court) and Harlem Valley Traveler's Association v. Stafford, 500 F.2d 328 (2d Cir. 1974), have been considered in the NEPA context. Certainly if Federally approved abandonment is a significant action for NEPA purposes, then direct federal abandonment is also covered.

Although the abandonment cases in this circuit have been limited to rail abandonment cases, the NEPA issues presented therein go far beyond this circumstance, as clearly discussed in City of New York, supra:

> ...there is...more at stake here than the interests of the named parties. To be sure, the precise consequences for the City, its economy and its people, are not readily ascertainable;but the railroad's demise will undoubtedly be followed by the relocation of some users with the attendant loss of jobs for employees, loss of business for the users, suppliers and customers, and ultimately both economic and physical deterioration in the local community. 337 F. Supp. at 162.

The same general consequences of abandonment which troubled the court in City of New York are equally applicable in the instant case with respect to the effects which abandonment of the Rochester main post office qua main post office can be expected to generate.

It is immaterial that these effects are secondary. Both 40 C.F.R. §1500.6(b) and 40 C.F.R. §1500.8(a)(3)(ii) recognize that secondary effects are part of the definition of "significance" for NEPA purposes, and in fact may be more important than primary effects.

Abandonment of the main post office in Rochester may lead to the loss of as many as 1400 jobs in the downtown Rochester area. In City of New York, supra, this type of secondary impact was recognized as being potentially significant under NEPA. It is not only the immediate loss of jobs but also the ultimate economic and physical deterioration in the impacted City which must be analyzed and weighed against the benefits of moving to Henrietta. NEPA, after all,

> contains no exhaustive list of so-called'environmental considerations'but without question its aims extend beyond sewage and garbage and even beyond water and air pollution... The Act must be construed to include protection of the quality of life for city residents. Hanly v. Mitchell, 460 F. 2d 640 at 647 (2d. Cir. 1972), cert. denied sub. nom. Hanly v. Kleindienst, 409 U.S. 990 (1972).

Furthermore, it is not necessary that the City, or the affected neighborhood, start out with what would be considered a "high quality" environment before the agency is required to consider the significance of the impact of its action on the urban area. In Hanly, supra, the Second Circuit noted that:

> Absent some showing that an entire neighborhood is in the process of redevelopment, its existing environment though frequently below an ideal standard, cannot be ignored. 460 F.2d at 831.

Even though the area surrounding the main post office in Rochester is undergoing redevelopment it is clear that the present post office was considered as an integral part of this redevelopment and not as an inconsistant future use. Abandonment must thus be considered both as to present impact and impact upon the projected redevelopment area.

The failure of the Postal Service to utilize the social sciences in analyzing human factors of environmental impact was recently characterised as "a

possibly more serious shortcoming" than the inadequate consideration of the physical effects which could be expected from the project under consideration. Chelsea Neighborhood Associations, supra; 516 F.2d at 388. In Chelsea the Second Circuit was concerned with the unknown possible effects on residents of a proposed residential tower that was to be constructed atop a Postal Service Vehicle Maintenance Facility in Manhattan. In the instant case we are concerned with far more certain consequences on as many as 1400 "breadwinners" and the City in which they reside, should their jobs be eliminated, or relocated outside the City to Henrietta. By treating those effects as insignificant, the Postal Service has not made the careful and informed decision required of it under NEPA.

The magnitude of impact generated by the relocation of a federal facility outside the central city is explained by the fact that the United States government is the nation's largest employer, and has consistently relocated its facilities, especially those employing large numbers of federal workers, outside of the "central cities." The relocation of one federal facility, therefore, is accurately viewed in the context of a much larger federal "exodus" from the nation's cities. The impact of relocating the hub of administrative business to the suburbs is clearly "major" and is both predictable and documented. See Equal Opportunity in Suburbia: A Report of the United States Commission on Civil Rights, July, 1974.

In the instant case, upon information and belief, approximately 1400 persons, a large number of whom are Rochester residents, are presently employed at the Rochester main post office. The Rochester facility is "convenient to the residents of low income and inner city families who find it a continuing source of employment." Affidavit of John Stainton in Support of Plaintiffs' Motion for a Preliminary Injunction, at 3-4.

The impact of relocation of a major federal facility such as the Rochester

main post office, can be illustrated from previously documented examples of federal agency facility abandonment in other facilities, such as the District of Columbia:

> It causes the departure of middle-class technical and professional families, mostly white but black as well, who follow their jobs. The District is then left more and more to the poor, who are predominantly black. This causes the departure of the private industries and businesses that service the Federal agencies and their susburban employees...This causes the process of flight to the suburbs to feed upon itself, and accelerate like an avalanche. Individuals who don't need to move do so to escape blacks, or rising taxes, or declining schools, or deteriorating neighborhoods...those to whom the city is left... demand more in services- education, welfare, training, health facilities, and so forth- and are less able to afford them than those who leave. Testimony of John Hechinger (former Washington, D.C. City Council Chairman), Transcript of Open Meeting Before the District of Columbia Advisory Commission to the U.S. Commission on Civil Rights, May 14, 1970, at 31-32.

The process of deterioration is the story, then, of the diminishing of a city's viability as a unit. Available resources dwindle while demands for services by the urban poor rise as they become the majority ecenomic class. It is also the story of adverse impact on particular groups of urban residents. The strongly adverse impact on minorities which is wrought by suburban relocation of federal employment opportunities is the result of the absence of available housing for minority employees and their families near job sites, or adequate transportation from the city to the suburbs. The problems which exacerbate the adverse human impact of agency relocation tc the suburbs and which must be analyzed pursuant to NEPA duties by the action-initiating agency include, but are not limited to:

(a) whether residential patterns in the new-agency-site suburbs preclude low-income minority persons currently employed at the Rochester facility from living near available work at the new facility;

(b) whether there is adequate public transportation from Rochester to the Henrietta suburbs, as evidenced by consideration of at least the following factors: (1) schedules; (2) routes; (3) time per trip and time between arrival

of service, e.g. bus arrivals during rush hours and off-hours; (4) the number of required route transfers; (5) fares and fare zones; (6) total cost per worker in time and fares, per working year; (7) distance of service points, e.g. bus-stops, from workers residences and their place of work at the new facility, and the expenditure of time and money required to reach the service.

As the testimony before the "Open Meetings" held by the State Advisory Committees to the U.S. Commission on Civil Rights in the early 1970's indicated, consideration of the burden of intercity transit on federal employees is abstract and impersonal without understanding what the "time" factor means to the worker. It means that the time spent in transit, including the time spent travelling to the point of service or from that point back to the residence, consumes time otherwise required for employment in second jobs relied upon for adequate provision of resources to the employee's family. This means inevitable latenesses to work, especially where transit service is infrequent or erratic, resulting in employee reprimands and firings and consequently, demoralization and unemployment; it means that for federal employees in low salary level employment (GS-2, GS-3, etc.), wage and other job compensation may be inadequate to compensate for transportation time and cost, the loss of other jobs occasioned through the consumption of the employee's spare time by transit. See, e.g. Transcript of Open Meeting Before the Arizona State Advisory Committee to the U.S. Commission on Civil Rights, May 14-15, 1971, v.2 at 24-25; Hearing Before the U.S. Commission on Civil Rights, Baltimore, Maryland, 1970 at 377; Transcript of Open Meeting Before the District of Columbia Advisory Committee to the U.S. Commission on Civil Rights, May 14, 1970, at 81-83.

Consideration of these human impact factors in assessing the impact of federal site selection is not only advisable- it is mandatory. Under Executive Order 11512, 35 Fed. Reg. 3979,(1970), which established policies to be followed by the General Services Administration in acquiring and assigning office

space, two factors were included for consideration: (1) the impact of a selection on improving social and economic conditions in the area and (2) the availability of adequate low and moderate income housing and adequate access from other areas of the urban center.

In evaluating these factors, the General Services Administration is directed to consult with HUD and other relevant federal agencies.

There is no indication in the Asessment in the instant case that such consultation by or with the General Services Administration ever occurred, or that, if it did occur, the Assessment's conclusions were, inter alia predicated upon such evaluation as mandated in Executive Order 11512.

II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

A. Plaintiffs are Not Barred from Equitable Relief by Laches.

Courts have been reluctant to dismiss environmental lawsuits concerned with alleged violations of statutory duties and safeguards on the ground of delay in bringing suit. Generally, the defense of laches will not lie to bar suits seeking the protection of environmental concerns. Steubing v. Brinegar, 511 F. 2d 489 (2d Cir. 1975); Save the Courthouse Comm. v. Lynn, 8 ERC 1209, 1214 (S.D.N.Y. 1975); City of New York v. United States, supra, 337 F. Supp. at 160. Under the traditional laches standard, it is for defendant to establish that plaintiffs' delay in bringing suit was unreasonable or inexcusable, and prejudicial to them. Environmental Defense Fund v. TVA, 468 F. 2d 1164, 1182, 4 ERC 1850 (6th Cir. 1972); Iowa Student Public Interest Research Group v. Callaway, 379 F. Supp. 714, 719, 6ERC 1727 (S.D. Iowa 1974); Save the Courthouse, supra. The Second Circuit has recently ruled that in cases alleging an agency's noncompliance with statutory directives, the critical question is "not how much earlier plaintiffs should have sued but whether injunctive relief pending compliance would still serve the public interest and purposes" of the statute involved. Steubing v. Brinegar, supra.

Viewed under these principles it can hardly be said that injunctive relief in the instant action would be barred by laches. The Rochester Post Office still stands, utilized as a main post office and employing approximately 1400 persons. The Henrietta facility is not yet a general mail facility, nor has the site become adapted at this time for exclusive use as such, nor have Postal Service employees yet been transferred there. For all purposes andeffects the Henrietta site

is still a site. The public interest in EIS preparation, especially as to the possibility of identification of more feasible alternative sites or courses of action, may still be safeguarded.

Finally, given the circumstances of the instant case including failure of the Postal Service to consult meaningfully, deliberately or effectively with concerned local agencies or interested parties, including plaintiffs (see Plaintiffs' Memorandum of Law at 4-8 wherein are discussed in detail such highlights of this communicative failure including failure to respond to plaintiffs' repeated requests for documents, site studies, and other information, failure to communicate in a timely fashion the decision not to prepare an EIS, delay in furnishing the Assessment to plaintiffs after publication despite timely requests for the same, letting of contracts for construction at the Henrietta site without soliciting comments on the Assessment from plaintiffs or any interested parties, failure to respond meaningfully to inquiries concerning failure to notify plaintiffs of the existence of the Assessment, refusal to meet with plaintiffs' representatives in the matter of A-95 review), laches should begin to run only from the time it became reasonably clear to plaintiffs that other efforts which might be undertaken, including conferral with defendants, would be fruitless. In this case plaintiffs considered legal action only as the final and least desirable alternative. The Postal Service never made it clear to plaintiffs that the options of consultation and cooperation would under no circumstances be successful. Rather, the Postal Service "led plaintiffs on" through silence, ambiguous responses, and accasionally, and usually belatedly, through the furnishing of some information. As late as October 3, 1975, the Postal Service appeared to hold out the option of mitigating adverse impact of the proposed action by stating

to Congressman Frank Horton (Plaintiffs' Memorandum of Law at 7) that the Rochester Postal Facility would continue to be occupied in whole or in part by the Postal Service, and, at the very least, would not be abandoned. Only when abandonment of the Rochester facility became an apparent certainty, on November 13 (through a belated answer to a request for information pertinent to A-95 review which described the probability of the Rochester facility becoming surplus property) did it become clear that legal action was the only recourse available to plaintiffs.

Therefore, the plaintiffs cannot be charged with delay in commencing suit and the defense of laches, if raised, must fall.

B. Defendants' Failure to Comply With NEPA Requirements Constitutes Grounds for a Preliminary Injunction.

In order to succeed on their motion for a preliminary injunction, plaintiffs must establish

> 'either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.' Gresham v. Chambers, 501 F. 2d 687, 691 (2d Cir. 1974), quoting Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250 (2d Cir. 1973).

The initial issue concerns the failure of the Postal Service to comply with federal statutes, administrative regulations, and executive orders. This failure has been established, supra and in Plaintiffs' Memorandum of Law, in discussions of the merits of plaintiffs' claim and defendants' affirmative duties. Plaintiffs have made the necessary showing sufficient to support the granting of preliminary relief with respect to the inadequacy under NEPA of the Postal Service's threshold determination that an EIS was not required. Defendants have violated both the spirit and letter of

NEPA and their own regulations duly promulgated thereunder through (a) failure to make an adequate record to support its conclusions, perfunctory and conclusory language being an unacceptable substitute, see Hanly v. Mitchell (Hanly I), 460 F. 2d 640, 4 ERC 1152 (2d Cir. 1972), cert. denied, sub. nom. Hanly v. Kleindienst, 409 U.S. 990 (1972); (b) absence of meaningful environmental review as evidenced by failure of the Assessment to consider or discuss meaningful alternatives, if any, to the proposed action, including the absence of such minimal efforts as soliciting and investigating proposals of feasible alternatives from plaintiffs or other interested persons, groups or agencies; (c) failure of the agency, prior to making its preliminary or threshold determination not to prepare an EIS, to give notice to the public of the proposed federal action with opportunity to submit relevant facts which might bear upon the agency's threshold decision. See Hanly v. Kleindienst (Hanly II), supra, 471 F. 2d at 836. The Hanly II requirement applies with equal force to both EIS preparation decisions and no-EIS threshold determinations. Save the Courthouse, supra, at 1221. If for no other reason, the agency should afford an opportunity to interested parties to present alternatives so that a lawsuit such as the instant action might be avoided, especially given the possibilities that either the parties will, after consultation and review, be convinced by the agency that the proposed action is the only reasonable course to take, or the agency will be convinced to adopt mitigating measures in its proposal, or abandon the proposal, or adopt a suggested alternative.

The violation of environmental protection laws has been viewed as the basis for the issuance of preliminary injunctions by the Federal Courts. In Keith v. Volpe, 352 F. Supp. 1324, 4 ERC 1350 (C.D. Cal. 1972), aff'd, 506 F. 2d 696 (9th Cir. 1974), cert. denied, 95 Sup. Ct.

826 (1975), the district court issued a preliminary injunction because it concluded that the Federal defendants had failed to comply with federal and state environmental protection laws and that therefore the public interest demanded prompt compliance with these provisions. The Ninth Circuit had held in an earlier case, Lathan v. Volpe, 455 F. 2d 1111, 3 ERC 1363 (9th Cir. 1971) that the issuance of a preliminary injunction was warranted to halt further acquisitions of land for the right of way of a proposed interstate highway where the federal defendants had failed to assess environmental impact, pending issuance of an EIS pursuant to section 102(2)(C) of NEPA. In explaining its position the court held that

> ...the longer the delay in applying NEPA...the less will be the chance to protect the city and its people from the environmentally detrimental effects of this project...unless the plaintiffs receive now whatever relief they are entitled to, there is danger that it will be of little or no value to them or to anyone else when finally obtained. 455 F. 2d at 1117, 3 ERC at 1365.

In Atchison, Topeka and Santa Fe Railway Co. v. Callaway, supra, plaintiffs sought a preliminary injunction to prevent the construction of a river navigation system, claiming that the defendants, Army Corps of Engineers, had violated several statutes including NEPA. The District Court for the District of Columbia held that a preliminary injunction had to issue because of the violation of the federal statute, and the demonstration of likelihood of success and irreparable harm by the plaintiffs. The court further held that violation of the federal statute relieved it from inquiring into the traditional requirements for equitable relief. 382 F. Supp. at 623, 7 ERC at 1024.

Moreover, since the "national interest" lies in the Congressional policy underlying NEPA, that being to compel the federal agencies to consider the national environmental and societal interest and reasonable

alternatives to the proposed action, an injunction should issue where NEPA had been violated through failure to prepare an EIS. Id. The District of Columbia Circuit Court has held that where the failure of the federal agencies to comply with NEPA threatened imminent and irreparable harm, and where their action was likely to have "direct, tangible consequences of an environmental character," a preliminary injunction would issue. Jones v. District of Columbia Redevelopment Land Agency, 499 F. 2d 502, 511, 6 ERC 1534, 1539 (D.C. Cir. 1974).

In Northside Tenants' Rights Coalition v. Volpe, 346 F. Supp. 244, 4 ERC 1376 (E.D. Wis. 1972) , it was held that where there is a "substantial probability that NEPA is applicable," as in a situation where federal approval for a project remains to be granted, and where corrective action to prevent environmental harm is possible, and where failure to grant a preliminary injunction pending compliance with the requirements of NEPA would permit a project to proceed to a point where NEPA would be inapplicable and where abandonment or alteration of the project to protect the environment would be impractical, a preliminary injunction should be granted. 346 F. Supp. at 249, 4 ERC at 1379-80.

The general rule regarding preliminary injunctions in cases of agency NEPA violations has also been accepted in the other Circuits. In Bradford Township v. Illinois State Toll Highway Authority, 463 F. 2d 537, 4 ERC 1301 (7th Cir. 1972), cert. denied, 409 U.S. 1047 (1972), the Seventh Circuit held that

> Federal Agencies are clearly charged with certain procedural requirements under NEPA and failure to comply therewith is a basis for an injunction. One of the requirements is that an impact statement must be filed showing the impact on the environment by virtue of the proposed agency action. Judicial relief is available to correct failure on the part of a federal agency to follow the procedural requirements under NEPA. 463 F. 2d at 539, 4 ERC at 1303.

This line of decisions stems from the holding of the United

States Supreme Court in United States v. City and County of San Francisco, 310 U.S. 16 (1940), wherein the Court stated:

> (W)e are satisfied that this case does not call for a balancing of the equities or for the invocation of the generalities of judicial maxims in order to determine whether an injunction should have issued.... The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. 310 U.S. at 30-31.

C. The Balance of Equities Favors Issuance of a Preliminary Injunction.

1. In General.

Since, as Plaintiffs have demonstrated, and supra, they would suffer irreparable damage if the agency actions in the instant case proceed without lawful and proper consideration of environmental impact pursuant to NEPA, "the equitable considerations favor the environment, the public and the plaintiffs" and requires that said actions be enjoined. Natural Resources Defense Council, Inc. v. Grant, 341 F. Supp. 356, 369, 3 ERC 1883, 1892 (E.D.N.C., Washington Div., 1972). See also SCRAP v. United States, 346 F. Supp. 189, 201 (D.D.C. 1972), rev'd on other grounds, 412 U.S. 669 (1973).

Given the balance of equities in favor of Plaintiffs in the matter of a preliminary injunction to restrain NEPA violations, the burden which Plaintiffs carry in regard to demonstrating irreparable injury so as to secure preliminary relief, is substantially reduced:

> Injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits. Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F. 2d 921, 925 (D.C. Cir. 1958).

It is now the Defendants' burden to show that Plaintiffs will not suffer irreparable injury or that the injury to the Defendants will outweigh the injury to Plaintiffs. As the three-judge panel in SCRAP v. United States, supra, stated in granting a preliminary

injunction to restrain a violation of NEPA,

> (I)n light of the strong likelihood that plaintiff will prevail on the merits, it would require a powerful showing by the defendants that the other aspects of the test point in their favor before relief could be denied. 346 F. Supp. at 201.

In addition to demonstrating the probable success on the merits, Plaintiffs can also demonstrate the probability (1) of irreparable injury absent the granting of preliminary relief; (2) that the granting of such relief will not result in substantial harm to other parties interested in the proceeding and would not be burdensome for the Defendants; (3) the public interest requires the granting of this preliminary relief at this time.

2. Plaintiffs Will Be Irreparably Injured Unless the Court Grants a Preliminary Injunction.

While Plaintiffs allege the probability of direct environmental injury as a result of the actions taken by the Defendants in violation of NEPA, it is nonetheless not the Plaintiffs' burden to prove such harm, since it has been shown that the Defendants have violated a non-discretionary statutory duty. This violation itself gives rise to the injury alleged, and merits preliminary relief even if the long-range direct environmental injury to Plaintiffs is incapable of proof at this time. NEPA does not command the foresight of prophets and visionaries to establish irreparable injury to a plaintiff, since

> the apparent failure to comply with the statutory mandate of NEPA constitutes irreparable injury to the class of people represented by the Plaintiffs. Izaak Walton League of America v. Schlesinger, 337 F. Supp. 287, 295 (D.D.C. 1971).

This definition of irreparable injury has also been adopted by the Second, Seventh, and Eighth Circuits. In Scherr v. Volpe, 466 F. 2d 1027, 4 ERC 1435 (7th Cir. 1972), an action for an injunction to prevent further construction or development of a highway project, the federal defendants argued that even though there had been a clear

violation of NEPA through failure to assess environmental impact pursuant to NEPA, no judicial relief could be afforded to the plaintiffs absent a showing of personal injury resulting therefrom. The Seventh Circuit summarily rejected this contention, referring to it as one which "would thwart the Congressional mandate by rendering impotent the procedural requirements of the National Environmental Policy Act of 1969." 466 F. 2d at 1034, 4 ERC at 1440. This shifting of the burden of considering environmental consequences of particular federal actions onto the Plaintiffs in a NEPA-violation case the court found to be unacceptable:

> If these agencies were permitted to avoid their responsibilities under the Act until an individual citizen, who possesses vastly inferior resources, could demonstrate environmental harm, reconsideration at that time by the responsible federal agency would indeed be a hollow gesture. Id.

The court in Scherr also held that a demonstration of probability of success on the merits of the NEPA violation claim was sufficient demonstration of "irreparable harm" to activate the issuance of a preliminary injunction:

> (I)f the project were allowed to proceed after the plaintiffs had demonstrated a probability of success on the merits,...(then the) careful and informed decision-making process...(mandated by NEPA) would be lost forever. Id.

Having reached its conclusion as to the substantive and procedural requirements of NEPA, the court held that:

> In order to protect the rights of the plaintiffs to have the agency consider the environmental consequences of this project, the district court properly directed that a preliminary injunction issue during the pendency of the proceedings. Id.

The irreparable injury, then, may be based primarily upon the deprivation of the Plaintiffs' rights to careful and informed, environmentally-sound decision-making, by the Defendants' failure to assess

the environmental impact of their actions. Demonstration of the failure of a federal agency to carry out its duties under section 102(2)(C) of NEPA, including failure to engage in required federal interagency consultation relative to environmental impact has been held to constitute a showing of "probable success" on the merits and "irreparable harm" warranting a preliminary injunction pending preparation and completion of an EIS in Steubing v. Brinegar, supra.

The Eighth Circuit held in Environmental Defense Fund v. Froehlke, 477 F. 2d 1033, 5 ERC 1313 (8th Cir. 1973) that

> a violation of NEPA itself may constitute a sufficient demonstration of irreparable harm to entitle a plaintiff to blanket injunctive relief. 477 F. 2d at 1037, 5 ERC at 1315.

Whether or not this court continues to treat "irreparable injury" in the manner of the Steubing, Scherr and Froehlke decisions, it is nonetheless clear that given the broad mandate of NEPA, "the word 'irreparable' must be given a broad and expansive meaning." Society for the Protection of New Hampshire Forests v. Brinegar, 381 F. Supp. 282, 283, 7 ERC 1076 (D.C.N.H. 1974); accord, I-291 Why? Association v. Burns, 372 F. Supp. 223, 6 ERC 1275 (D.C.Conn. 1974).

Failure to grant the Plaintiffs' motion for a preliminary injunction on grounds of absence of substantive evidence would violatively preempt NEPA by relieving Defendants of their duty to assess environmental impact and develop environmental information, and by shifting that burden onto Plaintiffs. There is no room for such a result even in the most narrow interpretation of the substantive and procedural requirements of the Act.

3. Issuance of a Preliminary Injunction Would Not Result in Substantial Harm to Others.

As pointed out, supra, where the applicant for a preliminary injunction makes out a strong case on the merits, the burden shifts to the defendant to show that any harm it will suffer by the grant of a preliminary injunction will outweigh the irreparable injury asserted by the plaintiff. Further, in the court's exercise of discretion to issue a preliminary injunction, "...considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury of the defendant." Sinclair Refining Co. v. Midland Oil Co., 55 F. 2d 42 (4th Cir. 1932). Accord, West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F. 2d 232, 2 ERC 1422 (4th Cir. 1971); Natural Resources Defense Council, Inc. v. Grant, supra.

The public interest presented here -- not permitting action by a government agency which may be in contravention of statutory and administrative procedures designed to protect the human environment -- outweighs the costs that may be incurred as a result of the delay brought about by a preliminary injunction. In Save the Courthouse, supra, the court granted a preliminary injunction for the same reasons advanced herein, despite the federal agency's claim that resulting damages would accrue to the agency well in excess of one million dollars, including maintenance costs and potential liabilities to contractors. It is worth noting that an EIS may well conclude that the action proposed by the Postal Service should proceed after all. The Second Circuit ruled in Steubing v. Brinegar, supra, that substantial additional costs occasioned by court-ordered delay may be supported by public interest considerations. That principle applies to the instant case.

The Court of Appeals for the District of Columbia Circuit has made it clear that considerations of administrative difficulty, delay

or economic costs -- which are inevitable in any situation in which NEPA has not been complied with, in a timely manner -- do not constitute the kind of harm or injury that militates against issuance of a preliminary injunction. Calvert Cliffs Coordinating Committee v. AEC, supra; Steubing v. Brinegar, supra; Greene County Planning Board v. FPC, supra; Scherr v. Volpe, supra. Moreover, any costs resulting from additional delay are the consequence of the Defendants' own failure to comply with NEPA. The expedition of compliance at this time will permit the most economical rectification of any environmentally unsound practices appurtaining to the proposed certification prior to the "institutionalization" of these undesirable elements. In NEPA cases, courts have preferred to preserve the status quo through the issuance of a preliminary injunction so as to reduce costs and maximize the practical possibility of incorporating into the project whatever changes might be indicated as necessary by a NEPA review. Jones v. District of Columbia Redevelopment Land Agency, supra; Northside Tenants' Rights Coalition v. Volpe, supra; Atchison, Topeka and Santa Fe Railway Co. v. Callaway, supra; I-291 Why? Association v. Burns, supra.

Conclusion

The District Court erred in holding that Appellants lacked standing to maintain their suit and should be reversed on this point on the basis of adequate demonstration of injury-in-fact and injury to interests arguably within the contemplation of interests sought to be protected under NEPA. (Brief of Appellants at 11-12).

The District Court erred in holding that the suit was barred by laches of both plaintiffs for reasons set forth, supra, at 44-46, and should be reversed on this point.

The District Court erred in holding that the United States Postal Service fully complied with the requirements of NEPA since (a) appellees failed to consult and coordinate with other federal, state and local agencies in connection with its plans for the construction of the General Mail and Vehicle Maintenance Facility in Henrietta, New York, and the consequent abandonment of the Rochester Main Post Office; (b) appellees' Assessment was conclusory and self-serving for reasons more fully set forth, supra, at 26-30, including failure to set forth a factual record as the basis of conclusions on non-significant environmental impact and availability of suggested possible impact-mitigating measures, as well as failure to otherwise "take a hard look" at the problem, with the assistance of preliminary investigation; (c) the Assessment failed to set forth alternatives to the proposed action and dismissed consideration of alternatives out-of-hand; (d) appellees improperly segmented their impact analysis to exclude the consideration of the causally-connected abandonment of the Rochester Main Post Office; (e) appellees failed to prepare an Environmental Impact Statement in spite of showings by the Assessment itself of potential serious and significant environmental harm at the project site and environs thereof.

The preparation of a full Environmental Impact Statement by the Postal

Service will, at this time, serve many important functions within the framework of NEPA:

(1) It will insure the active consideration of environmental consequences in the daily operations of the Postal Service, as to (a) the construction of the Henrietta facility; (b) resulting abandonment in whole or part of the existing Rochester facility; and (c) agency actions in general.

(2) It will identify secondary and indirect effects of the construction and operation of the Henrietta facility that may have extensive impact on the human environment, yet not be apparent from the Assessment.

(3) It may allow for the amelioration of already-identified adverse environmental impacts by design changes where feasible.

(4) It may indicate possible interrelations between agency actions, present and future, such as new suburban facility construction/ abandonment or phase-out of existing urban facilities.

(5) It may help educate the general public and stimulate debate about possible environmental consequences of this project.

(6) It will require adequate documentation of possible environmental impacts or non-impact to support the agency's decision to continue, modify or abandon the project, thereby encouraging the agency to act in accordance with the systematic, interdisciplinary and comprehensive approach contemplated by NEPA.

(7) It will promote intergovernmental cooperation in, and coordination of, environmental management by giving notice of the proposed action to all relevant agencies and the public, allowing for comments by such agencies and the public, and requiring a response by the Postal Service to such comments.

(8) It may stimulate applied research by the Postal Service on the human environment and the effects of its action thereon, so as to implement

the planning process contemplated by NEPA.

(9) It will open the Postal Service's planning process to the public and other governmental agencies before proposed plans are finalized, by means of the participatory process outlined in (7), supra.

(10) It will alert all parties affected by the construction of the Henrietta facility to inevitable adverse environmental impacts and consequences of the project, including the abandonment of the Rochester facility and consequences thereof, thereby allowing for appropriate adjustments in plans or operations so as to absorb or mitigate such impacts.

Therefore, the decision of the District Court should be reversed, and the case remanded with the direction that appropriate injunctive relief be issued with respect to further construction and all other actions on the new Henrietta postal facility, as well as to any action leading to the abandonment of the existing Rochester main postal facility, until the court is satisfied that the Postal Service has complied with NEPA in the preparation of an Environmental Impact Statement that adequately analyzes and considers (a) the environmental impact of construction and operation of the new Henrietta facility; (b) the environmental impact of abandonment of the Rochester postal facility in whole or part, or modification of the operations presently carried on therein, as a consequence of operation of the new Henrietta facility; (c) all reasonable alternatives to the new Henrietta facility as presently designed, and the abandonment, in whole or part, or modification of operations presently carried on in, the existing Rochester postal facility.

Dated: New York, New York

May 24, 1976

Respectfully Submitted,

THE COLUMBIA UNIVERSITY ENVIRONMENTAL
LAW COUNCIL, amicus curiae.

By: MARK L. SILVERSTEIN

Columbia University School of Law, 1976

Chairperson, The Columbia University
Environmental Law Council, 1975-76,
435 West 116th Street,
New York, N.Y. 10027

SUZANNE E. SCHWARTZ

Columbia University School of Law, 1977

Chairperson, The Columbia University
Environmental Law Council, 1976-77
435 West 116th Street,
New York, N.Y. 10027

Signed: Mark L. Silverstein

Suzanne E. Schwartz

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
: ss.
County of New York)

MARK L. SILVERSTEIN, being duly sworn, deposes and says:

not a party to this action, is over the age of eighteen, and is

1. That he is Chairperson of the Columbia University Environmental Law Council, 1975-76, which has as its address the Law School Building, 435 West 116th Street, New York, New York 10027, and which now files with the United States Court of Appeals for the Second Circuit a brief amicus curiae in CITY OF ROCHESTER and GENESSEE-FINGER LAKES REGIONAL PLANNING BOARD, Plaintiffs-Appellants, v. UNITED STATES POSTAL SERVICE and BENJAMIN F. BAILAR, Defendants-Appellees, No. 76-6065; and

personally served three

2. That the aforesworn ~~caused~~ copies of said brief ~~to be served~~ on the following parties by mailing this twenty-fourth day of May, 1976:

(a) Plaintiffs-Appellants:
to Goldstein, Goldman, Kessler and Underberg
1800 Lincoln First Tower
Rochester, New York 14604

(b) Defendants-Appellees:
to Gerald J. Houlihan, Esq.
Assistant U.S. Attorney
Room 233, United States Courthouse
Rochester, New York 14614

SWORN-TO AND SIGNED BEFORE ME THIS 24 DAY OF MAY 1976

Bernard P. Rose
notary public

Mark L. Silverstein
signature of aforesworn

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-8639225
Qualified in Queens County
Commission Expires March 30, 19 78